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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted]64

JOHN A. METHEANY,
Petitioner,

vs.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

JOHN A. METHEANY,
Petitioner,

vs.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled cause on February 10, 1968.

OPINION BELOW

The opinion of the Court of Appeals (*infra*, p. App. 1) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 14, 1968. Motion for rehearing was denied on March 28, 1968.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. 1254 (1). Jurisdiction of the District Court rested on 18 U. S. C. 152.

QUESTION PRESENTED

1. Whether the Government was precluded by the principles of collateral estoppel from proving in a perjury trial a certain exact same set of facts which had previously been determined in petitioner's favor in a trial for concealment of assets, in which petitioner had been found not guilty.

STATUTE INVOLVED

18 U. S. C. 152

Section 152. Concealment of assets; false oaths and claims; bribery

Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or

Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy proceeding; or

Whoever knowingly and fraudulently presents any false claim for proof against the estate of a bankrupt, or uses any such claim in any bankruptcy proceeding, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney; or

Whoever knowingly and fraudulently receives any material amount of property from a bankrupt after the filing of a bankruptcy proceeding, with intent to defeat the bankruptcy law; or

Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof, for acting or forbearing to act in any bankruptcy proceeding; or

Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a bank-

ruptcy proceeding by or against him or any other person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation; or

Whoever, after the filing of a bankruptcy proceeding or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a bankrupt; or

Whoever, after the filing of a bankruptcy proceeding, knowingly and fraudulently withholds from the receiver, custodian, trustee, marshal, or other officer of the court entitled to its possession, any document affecting or relating to the property or affairs of a bankrupt,

Shall be fined not more than $5,000 or imprisoned not more than five years, or both. As amended June 12, 1960, Pub. L. 86-519, Sec. 2, 74 Stat. 217; Sept. 2, 1960, Pub. L. 86-701, 74 Stat. 753.

STATEMENT

Petitioner was indicted in five counts, one for concealment of assets of a bankrupt (Quality Upholstery, Inc.) and four counts of perjury arising out of the bankruptcy proceedings concerning said bankrupt.[1] The concealment count was severed for trial, and tried first, resulting in a verdict of not guilty.

The four perjury counts were later tried as the instant cause, resulting in guilty verdicts as to counts 3, 4, and 6, and a not guilty verdict as to count 5 (Tr. Vol. III, p. 407).

A substantial part of the Government's evidence adduced at the trial consisted of, and concerned, certain assets

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1. Petitioner was first convicted on all counts but his convictions were reversed because of misjoinder with a count charging only another defendant, not arising out of the same transactions. *Metheany v. United States*, 365 F.2d 90 (9 Cir.).

(checks) which the Government adduced at the concealment trial, and contended were assets of the bankrupt which petitioner had concealed. This fact issue had been decided adversely to the Government at the prior trial. This evidence did not relate to the alleged false testimony, but was admitted, over objection, for the claimed purpose of showing motive for petitioner's alleged false testimony. The Court of Appeals, although ruling that the Government was not precluded by the principles of collateral estoppel from adducing such evidence, found it to have been instrumental in influencing the jury to return a guilty verdict in the instant case (*infra,* p. App. 1).

Prior to the filing of the petition in bankruptcy, one Sandoval, a stockholder in Quality Upholstery, Inc., gave petitioner $5,800.00 of his personal money in trust to pay certain obligations of said corporation (Vol. I, p. 27). This money was disbursed by petitioner with an accounting. Two checks (Ex. 10A and 10B) were made payable to fictitious corporations. These checks totaled $1,285.80. After the bankruptcy proceedings were underway, petitioner gave Sandoval a check in the amount of $1,285.80 (Ex. 19) for return of this money. These exhibits were the core of the Government's case in the trial of the concealment count. They were admitted in the instant case over objection (Tr. Vol. I, pp. 12-13), and motion to strike (Tr. Vol. II, p. 335). In addition, substantial testimony concerning them was admitted over objection. All of this evidence, the Court of Appeals found, influenced the jury, but was not precluded by the principles of collateral estoppel.

REASONS FOR GRANTING THE WRIT

The decision below is in conflict with decisions in other circuits. *United States v. Kramer,* 289 F. 2d 909 (C. A. 2), and *United States v. De Angelo,* 138 F. 2d 466 (C. A. 3).

> "A 'rule of evidence' has been recognized 'which accords to the accused the right to claim finality with respect to a fact or group of facts previously determined in his favor upon a previous trial'." *United States v. De Angeles, supra,* at 468.

In *United States v. Kramer, supra,* where it was held that proof of a fact determined at one trial could not be made in a subsequent trial, it is stated:

> "Appellant's alternative contention rests on that important principle of law of judgments, unhappily dubbed 'collateral estoppel,' which 'operates, following a final judgment, to establish conclusively a matter of fact or law for the purposes of a later lawsuit on a different cause of action between the parties to the original action.' It is much too late to suggest that this principle is not fully applicable to a former judgment in a criminal case, either because of lack of 'mutuality' or because the judgment may reflect only a belief that the Government had not met the higher burden of proof exacted in such cases for the Government's evidence as a whole although not necessarily as to every link in the chain. Coffey v. United States, 1886, 116 U. S. 436, 442-443, 6 S. Ct. 437, 29 L. Ed. 684 (criminal judgment applied as collateral estoppel in civil case); United States v. Oppenheimer, 1916, 242 U. S. 85, 87, 37 S. Ct. 68, 61 L. Ed. 167; United States v. Adams, 1930, 281 U. S. 202, 205, 50 S. Ct. 269, 74 L. Ed. 807; Sealfon v. United States, 1948, 332 U. S. 575, 578, 68 S. Ct. 237, 92 L. Ed. 180; Hoag v. State of New Jersey, 356 U. S. 464, 470-471, 78 S. Ct. 829, 2 L. Ed. 913."

Cf. also *Uhrlich v. United States,* 145 F. 2d 693 (C. A. 5), and *Wheatley v. United States,* 286 F. 2d 519 (C. A. 10).

In the trial of the concealment count the Government contended, as the core of its case, that petitioner concealed the checks referred to in the Statement. The jury found this factual issue adversely to the Government. In the instant trial, the Government made the same proof and the same contention, on the theory that said concealment constituted petitioner's motive for testifying falsely at the bankruptcy proceedings. This is exactly what the principle of collateral estoppel prevents the Government from doing.

Not only is the decision of the Court of Appeals in conflict with the decisions cited above, which conflict should be resolved by this Court, but also it involves an important principle of Federal law affecting the administration of justice which should be settled by this court. The unsettled state of the law in this area is strongly demonstrated by the recent extensive review of the cases at 9 A. L. R. 3d 203. We respectfully submit that this case is a good vehicle for clarification of the law concerning collateral estoppel in criminal cases.

CONCLUSION

We respectfully submit that for the reasons stated above the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(Appendix Follows)

Appendix

United States Court of Appeals for the Ninth Circuit

No. 22,026

JOHN A. METHEANY, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

[February 14, 1968]

Appeal from the United States District Court
for the District of Arizona

Before: BARNES, MERRILL and KOELSCH, Circuit Judges

BARNES, Circuit Judge:

This is the second time this matter has come before us. In order that this appeal may be understood, we adopt as accurate portions of the factual recitals contained in the Appellee's Brief, as follows:

> "In September of 1962 the Appellant John A. Metheany was indicted on one count of concealment of assets in bankruptcy and four counts alleging the making of a false oath. He was indicted along with a codefendant, G. Ronald Dotson, who was indicted for concealment of assets (not the same assets that the appellant allegedly concealed). In March of 1964 the Defendant and his codefendant were convicted on all counts by a jury in Phoenix, Arizona, in the United States District Court for the District of Arizona. * * * In August, 1966, this Court reversed the conviction of the District Court.... See *Metheany v. United States,* 365 F.2d 90 (9th Cir. 1966)."

In that opinion, we ruled against appellant when he claimed there was insufficient evidence to convict him on each of the several counts. We held the proof produced in that case was sufficient to show the falsity of the answers given by him, which had formed the basis of Counts III, IV and V; and we also held that "the several false answers were highly material." We granted a new trial, however, on the ground of improper joinder—that appellant and his co-defendant were entitled to separate trials of "the distinct and separate offenses not parts of the same transaction or connected together." Rule 8(b), Fed. R. Crim. P.

Prior to the new trial, on motion of the appellant, the concealment of assets count (Count I) was severed from the four false oath counts. The first count was tried before a jury, and appellant was found not guilty. A third jury was empaneled to try the four false oath counts, but a mistrial was declared. On retrial, a fourth jury returned a verdict of guilty as to three of the four false oath counts—III, IV and VI[1]—and a verdict of not guilty as to Count V.

Appellant was sentenced to two years on each count, the sentences to run concurrently.

Jurisdiction below rested on 18 U.S.C. § 152; and rests here on 28 U.S.C. § 1291.

Because Counts III, IV and VI were tried a second time, and perhaps with different evidence, our previous opinion cannot be the law of the case. However, none of the points raised by appellant on his first appeal are raised on this appeal. Here he urges four errors:

1. That the refusal to give requested instruction No. 4 was error.

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1. Count II related to Dotson's alleged concealment of assets; Count III related to when appellant had ceased to act as an attorney for the bankrupt; Count IV related to appellant's knowledge of who was the attorney for the bankrupt corporation.

2. That the refusal to give defendant's requested instruction No. 1 was error.

3. That Counts III and IV are contradictory to each other, and it was error to charge both.

4. That it was error to admit certain evidence relating to the crime of concealment of assets.

None of the points raised on this appeal have merit.

1. Proposed instruction No. 4 tells the jury, as a matter of law, there was no "valid and legal" transfer of the stock from Albert Sandoval. Appellant was not asked whether there was a valid and legal transfer of the stock. He was asked "to whom did he [Sandoval] dispose of his stock." He answered he "didn't know." When pressed, "You don't know?", he replied, "I know that he did; I didn't handle that transaction." There was evidence he did know, because he himself "handled it" on April 29, 1960. This was the testimony of two witnesses (Dotson and Sandoval) which was substantiated by two contemporaneously executed Exhibits (13 and 15). Sandoval testified the stock was sold to Sally Dotson for $100 in the presence of appellant, his wife, Ron Dotson and Sandoval's father; that he signed a bill of sale prepared by appellant. Exhibit 13 is a promissory note, dated April 29, 1960, signed by Sally Dotson, payable to Albert Sandoval, bearing the notation: "In consideration of the purchase of stock in Quality Upholstering, Inc., in the amount of 2500 shares." Exhibit 15 is purported copy of the minutes of a meeting of the Board of Directors of said corporation, held on April 29, 1960. These minutes were prepared by appellant (R.T. 359), and read in part: "The transfer of stock in the sum of 2500 from Albert L. Sandoval to Sally A. Dotson on the books of the corporation was approved."

Sandoval also testified he endorsed the stock certificates and mailed them to appellant.

With this evidence in support of Count VI, as well as other evidence before the jury, the instruction, in the form presented, was neither proper nor required. The jury was instructed carefully and at length on the subject by the trial court. The five essential elements of the charges made in Counts III, IV, V and VI were outlined: (1) the existence of the bankruptcy proceedings; (2) that a statement under oath was made therein, or in relation thereto; (3) that the oath was as to a material fact; (4) that the oath was false; (5) that the oath was knowingly and fraudulently false (R.T. 387-392). The first three essential elements were either admitted, undisputed, or matters of law. The last two were disputed—"very much disputed"—as the trial court instructed the jury. And their resolution was committed to the jury.

But even if some further instruction was required on the issue of the transfer of the stock, the language of the proffered instruction does not fit the evidence before the court.[2] There was evidence to support the conclusion that there had been a transfer of the stock by a precise compliance with Art. 10, § 321, Arizona Rev. Stat., A.1.

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2. As an example, requested instruction No. 4 states as a fact: "and that there is no evidence that the stock was properly endorsed." Appellant's Brief repeats this statement: "There is no evidence whatsoever to indicate that Albert Sandoval's stock certificate was endorsed." (Opening Brief, p. 9.) Appellant then refers to Vol. I, pp. 57-58, where an attempt to impeach Sandoval by reading his testimony at the previous trial, where he had said he "thought" he had mailed the certificates back to appellant. Completely ignored is Sandoval's direct testimony (Vol. I, p. 52) where he said he "had" mailed the certificates back to appellant. There then appears:

> "Q. Did you sign the back of them [certificates] before you mailed them?
>
> "A. Yes, sir.
>
> "Q. The form on the back?
>
> "A. Yes, sir."

No impeachment of this "endorsement" testimony was attempted.

We hold the refusal to give requested instruction No. 4 was not error.

2. The refusal to give instruction No. 1, as requested, was denied as "covered." The court had already given careful and detailed instruction on the falsity of the answers, and that before determining the falsity the jury must determine "what the question meant." (R.T. 388-391) Appellant withdrew his requested instruction No. 3 because it had been covered by the court. Appellant's counsel stated that was why he had withdrawn it—"the matter was covered elsewhere"—(R.T. 400). Instruction No. 3 was based on *United States v. Lattimore*, 127 F.Supp. 405 (D.D.C. 1955), and appears in the margin.[3] If instruction No. 3 was withdrawn as covered, we see no reason No. 1 was not covered.

We agree that requested instruction No. 1 was adequately and fully covered by other instructions, and find no error in its exclusion.

3. As to the overlapping of Counts III and IV, we find there was no overlapping. The first question asked for a date; the second, for the possible name of an attorney. The falsity of Count III was established by sufficient competent evidence, both oral (four witnesses) and written (Exs. 6 and 7). The falsity of Count IV was established, both by the uncontradicted testimony of Attorney Bergman (R.T. 68, 75), and appellant's own signature in Exhibits 31 and 32.

4. The evidence (and particularly checks marked Exs. 10 A, 10 B and 37) relating to appellant's handling of

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3. "You are further instructed that before you may conclude that the crime of giving a false oath has been committed, it must be determined what the words meant to the defendant at the time he offered them as his testimony and then conclude that the defendant did not at that time believe in the truth of such testimony according to the meaning he ascribed to the words and phrases he used. It does not make any difference whether the statements were true or false. The defendant's belief as to their truth or falsity is the issue."

money in pre-bankruptcy proceedings was offered to prove the motive for, or the intent of, his false answers, made shortly thereafter.[4] The court admitted them for the limited purpose of showing appellant's state of mind (R.T. 213, 335), or intent (R.T. 213). The jury was instructed of the limited purpose for which the evidence was admitted (R.T. 384).

Proof admitted for the limited purpose of showing state of mind or intent, even proof of other crimes, is a well recognized exception to the general rule of inadmissibility. *Reed v. United States,* 364 F.2d 630, 633 (9th Cir. 1966), *cert. denied,* 386 U.S. 918 (1967). *See Medrano v. United States,* 285 F.2d 23, 25-26 (9th Cir. 1960), *cert. denied,* 366 U.S. 968 (1961); *cf. Himmelfarb v. United States,* 175 F.2d 924 (9th Cir. 1949).

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4. These exhibits were:

(a) Check #2873 of John A. Metheany, Trustee, payable to "Sun Drapery," dated May 24, 1960, in the sum of $775.80 (Ex. 10 B).

(b) Check #2874 of John A. Metheany, Trustee, payable to "Marko Fabric," dated May 27, 1960, in the sum of $510.00 (total: $1,285.80) (Ex. 10 A).

(c) Check #2844 of John A. Metheany, Trustee, payable to "Factors Furniture," dated May 10, 1960, in the sum of $805.40 (Ex. 37).

There was also reference to a listed alleged creditor, "Riviera $97.25", said to be fictitious. This check was not cashed.

There was evidence each named above payee was fictitious; there were no such creditors. (R.T. 198-99.) On May 27, 1960, appellant Metheany wrote Sandoval that he had made such disbursements (Ex. 18) out of the $5,800 advanced by Sandoval to appellant on April 29th, 1960 (Ex. 16), for which Metheany gave a receipt (Ex. 17) and expressed the Trust purposes.

Appellant later, on December 10, 1961, repayed Sandoval $1,285.80, and on the check stated: "Repayment by Ron Dotson and Sally Dotson for funds advanced to pay Marko Fabric $510.00 and Sun Drapery $775.80. Endorser payee directs attorney to turn over cancelled checks to Dotson in exchange for their payment."

Dotson admitted endorsing Exhibits 10 A and B above, but denied receiving any proceeds thereof, and denied he had ever given money to Metheany to repay Sandoval.

The Reply Brief for appellant limits itself to appellant's fourth alleged error—the evidence of the manner in which appellant "handled the funds entrusted to him by Sandoval. . . . It . . . was not an essential element of the crime." (Reply Brief, p. 2.) That is correct. "It had nothing to do with the crime whatsoever." (Reply Brief, p. 2.) That is incorrect. "We make the forthright assertion . . . that this prejudiced the jury." (Reply Brief, p. 2.) If we change the word "prejudiced" to "influenced" the jury, we think the statement more accurate, and we agree.

We are repeatedly told "the government used it purely as motive." We agree the government used it to prove motive. This is alleged to constitute error "by reason of collateral estoppel and res adjudicata." We cannot agree.

We are told the government "relies solely on the theory that the evidence was admissible, for negating the possibly innocent focus of the defendant, and as proving the defendant's motive for perjuring himself." (Reply Brief, p. 3.) We are not certain we understand the meaning of this sentence, but, in general, we agree. That is why it is admissible.

Appellant seeks unsuccessfully to distinguish *Reed v. United States*, 364 F.2d 630, where this court held as follows:

> "Evidence of other crimes, despite its prejudicial effect, is admissible to establish motive if it is of high relevance. McCormick, Evidence § 157, p. 330 (1954). This court has held such evidence admissible for the purposes of showing intent, design, knowledge, or lack of innocent purpose. E.g., Medrano v. United States, 285 F.2d 23, 25-26 (9th Cir. 1960), cert. denied, 366 U.S. 968, 81 S.Ct. 1931, 6 L.Ed.2d 1258 (1961). Here, the purpose of the questioned evidence was to show motive for the kidnapping. The prosecution doubtless reasoned that a jury, deprived of the evidence, might have some difficulty in believing that two men would

intrude upon a strange residence late in the nighttime, abduct three adults, lock them in the trunk of an automobile, and transport them across a state boundary.

"The evidence was, of course, prejudicial to the appellants, but it was highly relevant and it was introduced for a proper purpose. There was no error in its admission." 364 F.2d at 633.

Nor can we find *United States v. Kramer,* 289 F.2d 902 (2d Cir. 1961), nor *United States v. De Angelo,* 138 F.2d 466 (3rd Cir. 1943), pertinent. In both *Kramer* and *De Angelo,* the defendant was acquitted of a charge of burglary, or robbery, and was then indicted on a charge of conspiracy to commit the same burglaries, or the same robberies.

Evidence to prove one fact in one trial is not per se inadmissible to prove the same or another fact in another trial charging a different and second crime.

We find no error with respect to the admission of evidence for the limited purposes for which it was offered, admitted and considered.

Finding no error in any respect, we AFFIRM the three count conviction.

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OCTOBER TERM, 1968

JOHN A. METHEANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1363

JOHN A. METHEANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 390 F.2d 559.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 1968. A petition for a rehearing was denied on March 28, 1968. The petition for a writ of certiorari was filed on April 26, 1968. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, after petitioner had been acquitted of a charge of concealment of assets from a bankrupt estate, the government was precluded by the doctrine of collateral estoppel from introducing evidence concerning the mishandling of these assets by petitioner, where that evidence was admitted for the limited purpose of proving motive at petitioner's trial for perjury arising out of his testimony in the bankruptcy proceedings.

STATUTE INVOLVED

18 U.S.C. 152 is set out in full in the petition for certiorari (pp. 2-3).

STATEMENT

1. After a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of three counts of perjury, arising out of a bankruptcy proceeding, in violation of 18 U.S.C. 152. On July 20, 1967, he was sentenced to two years' imprisonment on each count, the sentences to run concurrently.

In September 1962, petitioner had been indicted on one count charging concealment of assets in bankruptcy and four counts of perjury arising out of his testimony in the bankruptcy proceedings. He was indicted with a co-defendant who was charged with concealment of other assets. In March 1964, petitioner

and his co-defendant were convicted on all counts by a jury. In August 1966, the court of appeals reversed the conviction on the ground of improper joinder, finding that the offenses charged against petitioner and his co-defendant were distinct and separate and not part of the same transaction. *Metheany* v. *United States*, 365 F.2d 90 (C.A. 9).

Prior to the new trial, the concealment of assets count was severed, on petitioner's motion, from the four perjury counts. Petitioner was then tried first on the concealment count, and found not guilty by a jury. Petitioner was subsequently convicted, after another jury trial, on three of the four perjury counts (Counts III, IV and VI). The court of appeals affirmed (Pet. App. 8).

2. Petitioner served as attorney for Quality Upholstery, Inc., prior to its filing a petition in bankruptcy in June 1960 (Tr. 267, 269). Albert L. Sandoval was president of the company until April 1960, but was inactive in the running of the business (Tr. 23, 267). On April 29, 1960, at a meeting of stockholders, Sandoval was informed that there were some bills of the corporation, tax liens and salaries of employees which had not been paid (Tr. 26, 270-271). There were also checks which had been returned because of insufficient funds in the corporate bank account (Tr. 270-271). In order to protect his good name, Sandoval gave petitioner a check in the sum of $5800 to be used for the purpose of paying various creditors of Quality Upholstery (Tr. 61-62, 271). Petitioner sent Sandoval an accounting of the disbursement of these funds which recited that some of

the monies was disbursed to four concerns (Tr. 31-32). These four concerns did not actually exist and were not creditors of Quality Upholstery (Tr. 198-200). On December 10, 1961, nearly a year and one half after the bankruptcy proceeding had been instituted, petitioner returned the amount allegedly paid to two of these concerns to Sandoval (Tr. 34-37). This transaction was the basis of the charge of concealment of assets against petitioner. Petitioner contended that he held the funds which he had received from Sandoval in trust for Sandoval and not on behalf of the bankrupt estate (Tr. 290). He also denied receiving any funds from the checks made out to the fictitious payees (Tr. 278).

3. At the filing of the petition in bankruptcy by Quality Upholstery on June 17, 1960, the attorney for the bankrupt was Ira J. Bergman, who had been asked to serve in this capacity by petitioner (Tr. 68-72). A receiver was appointed to act on behalf of the bankrupt and in that capacity he received information that Sandoval had advanced funds to petitioner to be disbursed on behalf of Quality Upholstery. He unsuccessfully endeavored to obtain the cancelled checks relating to the transactions (Tr. 77-79). Subsequently, he filed a petition in the bankruptcy court for a turnover hearing which was held on January 29, 1962. Petitioner's testimony at that hearing formed the basis of the four counts of perjury (Tr. 80). These counts charged that petitioner knowingly testified falsely at the bankruptcy hearing that he: 1) had ceased to act as attorney for Quality Uphol-

stery on March 1, 1960, when in fact he served in that capacity until June 1, 1960 (Count III); 2) had only hearsay knowledge as to who had succeeded him as attorney for Quality Upholstery, when in fact he had personally requested Ira J. Bergman to serve in that capacity (Count IV); 3) had no records of the bankrupt in his possession when in fact he had the cancelled checks in his possession (Count V); and 4) did not know to whom Sandoval had sold his stock in the corporation when in fact he had personally handled the transaction (Count VI).

At the trial on the four perjury counts, evidence concerning the handling of the monies entrusted to petitioner by Sandoval was introduced to prove the motive for petitioner's testifying falsely at the bankruptcy hearing. Counsel for the government, both in his opening statement and his closing argument, emphasized the limited purpose for which this evidence was introduced (Tr. 12, 17, 247, 372). The trial court also stressed the limited purpose for which this evidence was admitted in its charge to the jury (Tr. 384). Petitioner's counsel twice informed the jury that petitioner had been acquitted of the concealment of assets charge (Tr. 207, 355).

ARGUMENT

Petitioner's argument that the government should have been collaterally estopped from introducing evidence concerning petitioner's mishandling of the funds entrusted to him in order to prove his motive for committing perjury is without merit. Petitioner's

acquittal of the concealment of assets charge did not amount to a finding of fact that mishandling of funds entrusted to him by Sandoval had not occurred. Rather, the verdict amounted at most to a finding that assets of the bankrupt corporation had not been concealed from the receiver. The jury at the first trial could, with good reason, have believed that petitioner tried to defraud Sandoval personally, rather than the bankrupt estate. Before the doctrine of collateral estoppel can be invoked it must appear that the factual issue was "necessarily determined" at the former trial, *United States* v. *Feinberg*, 383 F.2d 60 (C.A. 2), certiorari denied, 389 U.S. 1044; *Adams* v. *United States*, 287 F.2d 701, 704-705 (C.A. 5); see also *Abbate* v. *United States*, 359 U.S. 187, 200 n. 4 (opinion of Mr. Justice Brennan); *Hoag* v. *New Jersey*, 356 U.S. 464, 471.[1]

Petitioner's mishandling of the funds, even if they were personal funds of Sandoval, would show a motive to lie in the bankruptcy turnover proceedings. The evidence was thus properly admitted for this purpose. See *Reed* v. *United States*, 364 F.2d 630, 633 (C.A. 9), certiorari denied, 386 U.S. 918. The lim-

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[1] As the court below properly pointed out (Pet. App. 8), petitioner's reliance on *United States* v. *Kramer*, 289 F.2d 909 (C.A. 2), and *United States* v. *De Angelo*, 138 F.2d 466 (C.A. 3), is misplaced. In both those cases the defendants were acquitted of a charge of burglary or robbery and evidence of the burglary or robbery was introduced at a subsequent trial of conspiracy to commit the same burglary or robbery. Accordingly, the decision below, contrary to petitioner's contention (Pet. 4-5), in no respect presents a conflict with those holdings.

ited purpose for which the evidence was admitted was repeatedly emphasized by both government counsel and the trial court. Moreover, defendant's counsel informed the jury that petitioner had been acquitted on the concealment of assets charge. Since the evidence was properly introduced, it is inconsequential that it might have "influenced" the jury (see Pet. 4; Pet. App. 7).

That the jury understood the instructions and followed them can be seen by its acquittal of petitioner on Count V of the indictment. This count charged that petitioner testified falsely when he said that he had no records of the bankrupt corporation whereas he had the cancelled checks from the disbursement of the funds entrusted to him by Sandoval. Evidently, the jury believed that these checks were not records of the bankrupt because the money entrusted to petitioner belonged to Sandoval and not to the bankrupt. That belief is of course wholly consistent with the theory on which the perjury prosecution was based and with the limited purpose for which the challenged evidence was "offered, admitted and considered" (Pet. App. 8).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 309502 820